

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLOS DEMARCO FREEMAN,

Defendant-Appellant.

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UNPUBLISHED  
February 16, 2006

No. 258261  
Wayne Circuit Court  
LC No. 04-005067-01

Before: Borrello, P.J., and Sawyer and Fitzgerald, JJ.

MEMORANDUM.

Defendant was convicted in a bench trial of assault with intent to rob while unarmed, MCL 750.88. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to serve seven years, six months to twenty years in prison. Defendant appeals as of right, asserting that the trial court erred in the scoring of Offense Variable (OV) 13, MCL 777.43, continuing pattern of criminal behavior. We agree that OV 13 was incorrectly scored, but because the error was harmless, we affirm.

“If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant’s sentence.” MCL 769.34(10). However, a party may not challenge the scoring of the sentencing guidelines or the accuracy of the information used in imposing a sentence within the guidelines range unless the issue was raised at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed with this Court. *Id.* See also *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001).

Ten points are to be assessed for OV 13 where “[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of section 7401(2)(a)(i) to (iii) or section 7403(2)(a)(i) to (iii).” MCL 777.43(1)(c). The trial court relied on one drug conviction when assessing the ten points for this variable. Defense counsel initially objected, but expressly abandoned objections when told that the Legislature had amended the statute to include drug felonies.

However, the specific drug felony in defendant’s history was not among the ones the Legislature included for consideration when scoring OV 13. We therefore agree with defendant that he should have received a score of zero for that variable.

But recalculating accordingly defendant's recommended range for his minimum sentence yields a guidelines range of twenty-nine to 114 months, in which the minimum sentence defendant actually received, ninety months, still lies. Because correcting the unpreserved error still leaves defendant's minimum sentence within the range recommended by the guidelines, we deem the error harmless, and affirm. MCL 769.34(10). See also *People v Kimble*, 470 Mich 305, 312-313; 684 NW2d 669 (2004).

Affirmed.

/s/ Stephen L. Borrello  
/s/ David H. Sawyer  
/s/ E. Thomas Fitzgerald